IN THE SUPREME COURT OF MISSOURI

CITY OF WASHINGTON, MISSOURI,	)	
	)	
Appellant,	)	
	)	
v.	)	Supreme Court No. SC84791
	)	
DANIEL BARNHART,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Franklin County
Twentieth Judicial Circuit
Division 6
Honorable Joseph M. Ladd

APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINTS RELIED ON

I. RESPONDENT DANIEL BARNHART IS NOT PROHIBITED BY THE CODE OF STATE REGULATIONS FROM MAINTAINING A BUSINESS OFFICE WITHIN THE CITY OF WASHINGTON, MISSOURI

Beal v. Industrial Commission, 535 S.W.2d 450 (Mo.App. W.D. 1975)

Section 71.620 RSMo. (2000)

4 C.S.R. 250-4.050 (2)

4 C.S.R. 250-8.010 (1)

II. THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE JUDGMENT OF DISMISSAL BECAUSE JEOPARDY HAS NOT ATTACHED AND BECAUSE THE JUDGMENT OF DISMISSAL WAS NOT BASED ON ANY EXTRINSIC EVIDENCE

State v. Morton, 971 S.W.2d 335 (Mo. App. E.D. 1998).

St. Louis County v. Glore, 715 S.W.2d 565 (Mo.App. E.D. 1986)

State v. Bibb, 922 S.W.2d 798 (Mo.App. E.D. 1996)

City of Kansas City v. Johnney, 760 S.W.2d 930 (Mo.App. W.D. 1988)

Serfass v. United States, 420 U.S. 377 (1975)

Section 547.200 RSMo. (2000)

Section 512.020 RSMo. (2000)

ARGUMENT

I. RESPONDENT DANIEL BARNHART IS NOT PROHIBITED BY THE CODE OF STATE REGULATIONS FROM MAINTAINING A BUSINESS OFFICE WITHIN THE CITY OF WASHINGTON, MISSOURI

Respondent Daniel Barnhart ("Barnhart" or "Respondent") argues in Part I of Respondent's Substitute Brief that the Appellant City of Washington, Missouri (the "City") cannot require Barnhart to have a business license or to pay a license tax because the Missouri Code of State Regulations prohibits Barnhart from maintaining a business office within the City of Washington, Missouri. To support this contention, Barnhart relies on regulations codified at 4 C.S.R. 250-4.050(2) and 4 C.S.R. 250-8.010(1). In spite of Barnhart's assertions, the cited regulations neither expressly or implicitly prohibit real estate salespersons from maintaining business offices in the way those terms are used in Section 71.620 RSMo. 2000.

The cited regulations provide, in pertinent part, as follows:

4 C.S.R. 250-4.050(2):

> "A…salesperson license shall be issued only to a person who is associated with a broker. The license of each…salesperson shall be mailed to the broker. A…salesperson cannot be licensed with more than one (1) broker during the same period of time."

4 C.S.R. 250-8.010(1):

> "No salesperson may be associated with a broker not maintaining a regularly established place of business or a broker not actively engaged in the real estate business."

These regulations don't prohibit Barnhart, as a real estate salesperson, from maintaining a business office where he conducts his business as a real estate salesperson, but simply requires a real estate salesperson to be associated with a broker. The regulations simply prohibit Barnhart from engaging in the business of selling real estate as a real estate salesperson independently of the supervision of a licensed real estate broker.

In addition to the regulations discussed above, Barnhart relies on the decision in Beal v. Industrial Commission, 535 S.W. 2d 450 (Mo.App. W.D. 1975) for the proposition that real estate salesperson cannot "maintain an office" pursuant to Section 71.620. Contrary to Barnhart's arguments, the Court in *Beal* never stated either in dicta or in the holding that only real estate brokers can maintain offices. The issue presented in *Beal*, which is totally unrelated to the case at hand, involved "whether commission real estate salesman associated with appellant Beal and respondent Willey, Inc., are 'in employment' within the intent and purpose of the Missouri Employment Security Law, Chapter 288, RSMo." *Beal* at 457.

The *Beal* decision is informative here because it affirms that a real estate salesperson can meet the regulatory requirements of association with a real estate broker without being physically located in the same office with the broker. In

Beal, Thomas E. Beal, a licensed real estate broker maintained offices in Kansas City and Clayton, Missouri. At both of these offices he employed real estate salespersons as independent contractors. The salespersons were not provided space at Beal's offices, but rather were responsible for their own office space. The Court recognized the requirement that real estate salespersons be, either directly or indirectly, associated with a real estate broker. Of interest to the case at hand is the fact that the Court found the "association" requirement to be met in spite of the fact that the salespersons in Beal's employ were not provided office space.

II. THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE JUDGMENT OF DISMISSAL BECAUSE JEOPARDY DID NOT ATTACH AT THE TRIAL COURT AND BECAUSE THE JUDGMENT OF DISMISSAL WAS NOT BASED ON EXTRINSIC EVIDENCE

Barnhart argues, in Respondent's Brief, that this Court lacks appellate jurisdiction to review the dismissal of the information by the trial court because, according to Barnhart, jeopardy attached at the trial court and consideration of this appeal would constitute double jeopardy. In support of its argument Barnhart argues that the Judgment of Dismissal was based in part on evidence presented by Barnhart at the hearing on his Motion to Dismiss. This assertion is incorrect because jeopardy never attached at the trial court level and because the determination was not based upon extrinsic evidence.

Generally, the state does not have a right to an appeal in a criminal case unless a right of appeal is conferred by statute. State v. Morton, 971 S.W.2d 335 (Mo. App. E.D. 1998). According to Barnhart, the City's authority to appeal the trail court's Judgment of Dismissal for the alleged municipal ordinance violation is derived from Section 547.200.2 RSMo 2000 (Respondent's Substitute Brief at Page 6). The Court in St. Louis County v. Glore, 715 S.W.2d 565, 567 (Mo.App.E.D. 1986), found that Section 547.200 was inapplicable to ordinance violations because ordinance violations are regarded as civil. Instead, the Court determined that Section 512.020 authorized municipal corporations, such as the City, to appeal the dismissal of ordinance violations.

Based on Section 512.020, the City may appeal the Judgment of Dismissal so long as jeopardy has not attached. Jeopardy does not attach until, "the defendant has been put to trial before the trier of fact, whether the trier of fact be a jury or a judge." State v. Bibb, 922 S.W.2d 798, 801 (Mo.App.E.D. 1996). In a case tried before a jury, this occurs when the jury is impaneled and sworn in. City of Kansas City v. Johnney, 760 S.W.2d 930 (Mo.App.W.D. 1988).

This case was transferred to the Circuit Court of Franklin Count, Associate Division 6 on Barnhart's Request for Jury Trial (L.F. 1). Because no jury was ever impaneled or sworn in, jeopardy has not attached, and this Court has jurisdiction to review the Judgment of Dismissal.

Respondent bases his contention that this Court lacks jurisdiction on several cases including State v. Reed, 770 S.W.2d 517 (Mo.App. E.D. 1989), State v.

Coor, 740 S.W. 2d 350 (Mo.App. S.D. 1987) and *Morton*. This line of cases holds that "jeopardy does not attach when an indictment is dismissed so long as the dismissal was not an adjudication of defendant's guilt or innocence based on extrinsic evidence outside the indictment or information such as stipulated facts or evidentiary facts submitted to the court for its review." *Morton* at 339.

Barnhart argues that the Judgment of Dismissal was based on the consideration of affidavits, memoranda and depositions and because Barnhart was discharged, jeopardy did attach. This argument misconstrues the holdings of *Reed*, *Morton* and *Coor*, which are based largely on the United States Supreme Court's ruling in Serfass v. United States, 420 U.S. 377 (1975). The trial court's ruling on Barnhart's Motion to Dismiss did not adjudicate the guilt or innocence of the Respondent. The Judge was limited in his determination to ruling on the Motion set before him.

The facts of the *Serfass* case are directly analogous to those in this case. The defendant in that case filed his motion to dismiss along with affidavits and a file containing evidence from a previous administrative review hearing. The indictment was dismissed based on the undisputed facts contained in the affidavits and the file. The United States government appealed. Because the defendant had not waived his right to a jury trial, as in this case, the United States Supreme Court in a near unanimous decision, ruled that,

> "Under our cases jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment.

> Petitioner was not then, nor has he ever been, 'put to trial before the trier of facts.' The proceedings were initiated by his motion to dismiss the indictment…At no time during or following the hearing on petitioner's motion to dismiss the indictment did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach…Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy."

Further, the Judgment of Dismissal was based on purely legal considerations. According to the Judgment of Dismissal, the ruling was strictly that as a matter of law it is legally impossible for Barnhart to maintain an office within the City and therefore be required to obtain a business license because he is exempt from doing so under Section 71.620 RSMo. (L.F. 104). Any and all facts presented at the hearing were irrelevant to this determination.

As stated in *Reed*, "(t)he label attached to a ruling by a trial judge is not determinative." *Reed*, at 520. Instead, the substance of the trial court's ruling is determinative, not its form.

Here, the substance of the trial court's ruling was that Barnhart, as a real estate salesperson, could not legally maintain an office within the City and therefore under Section 71.620 was not subject to the City's licensure

requirements. There was no adjudication of Barnhart's guilt or innocence, and jeopardy did not attach. This Court has jurisdiction of this appeal.

CONCLUSION

For the reasons set forth in Appellant's Substitute Reply Brief and for the reasons stated herein the holding of the trial court that as a matter of law the City could not require Barnhart to have a business license or impose a license tax upon him because Barnhart does not and cannot maintain a business office in the City should be reversed.

Respectfully submitted,

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By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 (b)

THIS IS TO CERTIFY that Appellant's Substitute Reply Brief complies with Rule 84.06 (b) and that it contains 1,789 words.

_____
Joseph C. Blanner

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that two (2) copies of the above and foregoing were mailed this ____ day of January, 2003, to Mr. Kurt A. Voss, Esq., Attorney for Respondent, First Bank Building, Suite 209, P.O. Box 2114, Washington, MO 63090.

_____
Joseph C. Blanner